

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 02-0432P
Sales/Use Tax
For the Years 1987-2000

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ISSUE

I. Tax Administration- Fraud Penalty

Authority: IC 6-8.1-10-4, 45 IAC 15-5-7 (3).

The taxpayer protests the imposition of the one hundred percent (100%) fraud penalty.

STATEMENT OF FACTS

The taxpayer is a husband and wife who operate a small business. The Indiana Department of Revenue, hereinafter referred as the "department," determined that the taxpayer had collected but not remitted sales taxes to Indiana from 1987 through 2000. The department assessed the sales taxes, interest, and the one hundred percent (100%) fraud penalty. The taxpayer protested the assessment of the fraud penalty and a hearing was held. The husband appeared at the hearing.

I. Tax Administration- Fraud Penalty

DISCUSSION

The taxpayer protests the imposition of the one hundred per cent (100%) fraud penalty.

The fraud penalty is imposed pursuant to IC 6-8.1-10-4 as follows:

If a person fails to file a return or to make a full tax payment with that return with the fraudulent intent of evading the tax, the person is subject to a penalty.

The Regulations set out five required elements for establishing fraud. These five elements are found at 45 IAC 15-5-7 (3) as follows:

(A) Misrepresentation of a material fact: A person must truthfully and correctly report all information required by the Indiana Code and the department's regulations. Any failure to correctly report such information is a

misrepresentation of a material fact. Failure to file a return may be a misrepresentation.

(B) *Scienter*: This is a legal term meaning guilty knowledge or previous knowledge of a state of facts, such as evasion of tax, which it was a person's duty to guard against. A person must have actual knowledge of the responsibility of reporting the information under contention. However, the reckless making of statements without regard to their truth or falsity may serve as an imputation of *scienter* for purposes of proving fraud.

(C) *Deception*: Deception operates on the mind of the victim of the fraud. If a person's actions or failure to act causes the department to believe a given set of facts which are not true, the person has deceived the department.

(D) *Reliance*: Reliance also concerns the state of mind of the victim and is generally considered along with deception. If the person's actions, failure to act, or misrepresentations cause the department to rely on these acts to the detriment or injury of the department, the reliance requirement of fraud will be met.

(E) *Injury*: The fraud instituted upon the department must cause an injury. This can be satisfied simply by the fact that the misrepresentation(s) caused the department not to have collected the money which properly belongs to the state of Indiana.

In this case, the taxpayer misrepresented to the department that it did not have sales tax to remit by failing to file the required returns. The taxpayer had filed returns and remitted the tax correctly prior to 1987 which shows that the taxpayer understood its duty to remit the collected sales taxes to the state. Further, the taxpayer admitted at the hearing that he always knew that he was supposed to remit the collected sales taxes. The department was deceived by the taxpayer's actions in that the department did not know that the proper amount of taxes were not being remitted. The department relied on the taxpayer's indication that no taxes were due. This reliance caused injury to the state in that it did not collect the proper amount of taxes. The facts of this case meet the requirements for the imposition of the one hundred percent (100%) fraud penalty.

FINDING

The taxpayer's protest is denied.